

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C 20554

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JUL 15 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Amendment of the Commission's)
Regulatory Policies To Allow)
Non-U.S.-Licensed Space Stations)
To Provide Domestic and)
International Satellite Service)
in the United States)

IB Docket No. 96-111

and)

Amendment of Section 25.131 of)
the Commission's Rules and)
Regulations to Eliminate the)
Licensing Requirement for)
Certain International Receive-)
Only Earth Stations)

CC Docket No. 93-23
RM-7931

and)

COMMUNICATIONS SATELLITE)
CORPORATION)
Request for Waiver of Section)
25.131(j)(1) of the Commission's)
Rules As It Applies to Services)
Provided via the INTELSAT K)
Satellite)

File No. ISP-92-007

COMMENTS OF INTELSAT

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The International Telecommunications Satellite Organization ("INTELSAT"), by counsel and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, hereby submits these comments in response to the Commission's Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding.

I. INTRODUCTION

INTELSAT is an international cooperative organization which owns and operates a global satellite network for the purpose of

providing fixed satellite communications services to its members. INTELSAT's members are 139 nations represented within the organization by their signatories to the INTELSAT Operating Agreement. These signatories are currently a mix of government-owned postal and telecommunications administrations ("PTTs") and private corporations.

INTELSAT is interested in this proceeding because it desires to provide satellite capacity for use within the United States. Its comments are limited to the Notice's proposed treatment of intergovernmental organizations ("IGOs") seeking to provide satellite capacity within the United States.^{1/}

II. BACKGROUND

Within the past year, the Commission has substantially revised its rules to permit various telecommunications service providers from the United States and other countries to serve different geographic markets with greater ease and fewer regulatory burdens.^{2/} In DISCO I, for example, the Commission altered its policies and adopted rules making it easier for any satellite system licensed by the FCC to offer its services within the United

^{1/} Earth station operators seeking to use the INTELSAT system for communications to, from, or within the United States are required, or course, to procure the space segment through COMSAT, the U.S. signatory to INTELSAT

^{2/} See, e.g., In re Market Entry and Regulation of Foreign-Affiliated Entities, Report and Order, 10 FCC Rcd. 3873 (1995); In re Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, Report and Order, 11 FCC Rcd. 2429 (1996) ("DISCO I").

States or between the United States and other countries without obtaining special authority from the agency. These new rules, however, do not permit non-FCC-licensed satellite systems ("foreign satellites" or "foreign satellite systems") to provide service within the United States absent special circumstances. Therefore, the Commission has proposed rules in this Notice which will make it easier for foreign satellites to provide service within the United States. INTELSAT applauds the Commission's goals for this proceeding; if ultimately achieved they will not only bring symmetry to the FCC's satellite communications policy by allowing domestic and foreign satellite systems to serve the same markets, but will also benefit consumers of satellite service by introducing additional competitors to the market.

The Notice states three primary objectives for this proceeding: (i) to promote competition for both domestic and foreign satellite services; (ii) to prevent anti-competitive conduct by satellite operators offering service within the United States; and (iii) to encourage other countries to open their satellite communications markets to FCC-licensed providers.

To achieve the first objective the Notice proposes a uniform regulatory framework designed to make it easier for foreign satellite systems to serve the United States market.^{3/} The Notice

^{3/} The FCC currently evaluates applications involving foreign satellite systems on an ad hoc basis. Generally, the Commission has authorized service between the United States and other countries via foreign satellite systems only if the licensing country permits FCC-licensed systems to serve its market. The Commission has authorized the use of foreign satellite systems for
(continued...)

anticipates that this framework will increase competition and benefit end users in the United States by facilitating much greater access to foreign satellites.^{4/}

To achieve the second and third objectives, the Notice proposes using a test called the "ECO-Sat test" to evaluate a foreign satellite system's ability to provide service within the United States.^{5/} Under this test, an earth station license application (which must be filed with the FCC) that proposes sending or receiving signals to or from a foreign satellite will be judged by the "effective competitive opportunities" available to FCC-licensed satellite systems in the markets served by the foreign satellite system. The test is designed to ensure that foreign satellite systems do not have a competitive advantage over their FCC-licensed counterparts and is supposed to provide an incentive for foreign PTTs to open their markets to FCC-licensed satellite operators.^{6/}

^{3/}(...continued)
domestic service within the United States only if FCC-licensed satellites could not be used to meet this demand. See, e.g., In re IDB Worldcom Servs., Inc., 10 FCC Rcd. 7278, ¶¶ 7-11 (1995).

^{4/} Notice ¶ 1.

^{5/} This test was derived from the standard the Commission developed for determining whether foreign communications carriers (other than satellite operators) should be allowed to provide services within the United States. See In re Market Entry and Regulation of Foreign-Affiliated Entities, supra note 2.

^{6/} In addition to using the ECO-Sat test, the FCC intends to evaluate an earth station application on the basis of such factors as: (i) the general significance of the proposed entry to the promotion of competition in the United States and global satellite service markets; (ii) issues of national security, law enforcement,
(continued...)

As stated above, INTELSAT supports the Commission's efforts to develop a more symmetrical and pro-competitive satellite communications policy by permitting foreign satellite systems to provide service within the United States on the same basis as domestic satellite providers. INTELSAT urges the Commission, however, to reject any test that would condition access to the United States by an IGO upon a finding that some percentage of the IGO's members permit FCC-licensed satellites to provide analogous services in the members' markets.

III. INTELSAT SUPPORTS IN PRINCIPLE THE FCC'S OBJECTIVES OF DISCOURAGING ANTI-COMPETITIVE CONDUCT AND OPENING FOREIGN COMMUNICATIONS MARKETS, BUT IT CANNOT ENDORSE SOME OF THE ALTERNATIVE MEANS THAT THE COMMISSION HAS PROPOSED TO ACHIEVE THESE OBJECTIVES

The Notice proposes using the ECO-Sat test to help ensure that foreign satellite systems do not gain a competitive advantage over FCC-licensed satellite systems, and to encourage open telecommunications markets for FCC-licensed service providers. The ECO-Sat test consists of a two-pronged analysis focusing on: (i) a foreign satellite system's "home market;"^{2/} and (ii) some or all of the route markets that will be served in connection with the earth station which is the subject of an application filed with the FCC. The test examines on a route-by-route and service-by-service basis

^{6/}(...continued)
foreign policy, and trade; and (iii) spectrum availability and coordination. Notice ¶¶ 48-51.

^{2/} A foreign satellite system's home market is the market within the country that licensed the system and coordinated its deployment with the International Telecommunications Union.

whether legal or practical barriers to competition from FCC-licensed systems exist in the relevant market.

The Notice properly recognizes that the ECO-Sat test does not work when applied to IGOs such as INTELSAT. One reason for this is that IGOs do not have a single home market, which makes it difficult for the FCC to apply the home market prong of the test. Another reason is that most IGOs serve routes from the United States to virtually every country in the world, making application of the route market prong of the test difficult.

Consequently, the Notice suggests three alternative tests for evaluating earth station applications proposing operations with an IGO.^{8/} The first alternative test is remarkably similar to the ECO-Sat test in that it conditions access to the United States market upon the openness of the home market of each IGO member state or the various route markets served by the IGO.^{9/} The second alternative test is a variation on the ECO-Sat test that would require a minimum number of an IGO's members to permit FCC-licensed systems to operate in their home markets.^{10/} The third alternative test consists of a subjective evaluation about the IGO's ability to

^{8/} The Notice indicates that the Commission will employ one of these alternative tests only when evaluating earth station applications that propose to provide service within the United States via an IGO; applications proposing international communications over INTELSAT and Inmarsat will continue to be reviewed according to the agency's current policies. Id. ¶ 70. INTELSAT supports this distinction and the Commission's conclusion to continue licensing international services provided by INTELSAT and Inmarsat under its present policies

^{9/} Id. ¶ 66

^{10/} Id. ¶ 67.

diminish effective competition within the United States.^{11/} For the reasons discussed below, INTELSAT urges the Commission to adopt the third alternative test.

A. The Commission Should Adopt a Market Access Test for IGOs that Focuses Broadly on the Competitive Consequences of the IGO Providing Service Within the United States.

INTELSAT urges the Commission to adopt a market access test for IGOs that focuses broadly on the competitive consequences of an IGO providing service within the United States, not on some number or percentage of foreign markets that allow access by FCC-licensed satellite systems. Such a test is consistent with the pro-competitive emphasis of the Notice and would serve the FCC's objective of fostering competition as effectively as the ECO-Sat test but without the difficulties inherent in the other IGO tests proposed in the Notice.^{12/} Pursuant to the Notice's third alternative test, an earth station applicant would bear the burden of demonstrating that its proposed use of the IGO's space segment would not diminish competition in the relevant service market. If the Commission finds that the IGO's participation in the market would not in fact diminish competition, the agency should grant the application.

Although the Notice's third alternative test is much more subjective than either the ECO-Sat test or the Notice's other alternative IGO tests, it is a workable standard and the most well-

^{11/} Id. ¶ 68.

^{12/} See infra Section III.B for a discussion of these difficulties.

suited test for this particular case. Sufficient data exists to quantify the current state of competition on a service-by-service basis for satellite services within the United States, and to demonstrate how the introduction of an IGO's resources into the relevant market would affect that market. For example, an applicant wishing to use INTELSAT space segment capacity for DBS service within the United States could easily find reliable data on the number of DBS providers currently serving the market, supply and demand figures for transponders suitable to DBS service, etc.,^{13/} and use this data to prepare an analysis on how the use of INTELSAT's space segment would impact the market.^{14/} Armed with such information, the Commission could determine whether granting the application would diminish competition.

^{13/} Much of this information currently exists in the public record at the FCC. Additional information is readily available from private companies. The Communications Center in Clarksburg, Maryland, for example, prepares a comprehensive supply and demand report on a quarterly basis concerning transponders in use. Other companies publish similar information.

^{14/} Incidentally, the portion of INTELSAT space segment capacity available for any type of U.S. domestic use is very small. Although these resources are sufficient to provide U.S. consumers with greater service options, their use certainly would not enable INTELSAT's U.S. signatory (i.e., COMSAT) to wield market power within any U.S. satellite communications market. Furthermore, permitting the use of INTELSAT space segment for communications within the United States would have little impact on the efficient use of the INTELSAT system itself and even less impact on individual INTELSAT members given the small ownership stake each member holds in the organization.

- B. The Commission Should Reject Any Test that Would Condition an IGO's Ability To Provide Service Within the United States on a Finding that Some Portion of the IGO's Members Permit FCC-Licensed Satellites To Provide Analogous Services in Their Markets.

INTELSAT opposes adoption by the Commission of any test that conditions an IGO's ability to provide service within the United States upon a finding that some portion of the IGO's members permit FCC-licensed satellites to provide analogous services in their markets. Such a test would create internal conflicts for an IGO, pitting the interests of some members against those of others and interposing the interests of the IGO against the sovereign policies of its members.

An ECO-Sat test may be an effective means of opening new markets to FCC-licensed satellite systems when applied to foreign PTTs because these entities have the ability to influence domestic policy. Such a test is completely ineffective, however, when applied to an IGO because an IGO does not control (and, therefore, must not be held responsible for) the domestic policies of its sovereign members. Given this fundamental difference between a PTT and an IGO, the Commission should not bar an IGO from providing services within the United States because some of its members have not yet opened their markets to FCC licensed satellite systems if an otherwise pro-competitive result would be achieved.^{15/}

INTELSAT does not oppose bilateral or multilateral efforts by the United States to facilitate broader market access for satellite

^{15/} Attempts to leverage IGO members in this manner may also be contrary to the IGO's charter or the purposes for which it was established.

systems; rather, INTELSAT has itself adopted direct access policies and accepts increased global competition in the satellite communications market. It is a well established INTELSAT policy to accommodate the pro-competitive domestic policies of any of its members. As a cooperative international organization, however, INTELSAT cannot elevate the interests of some of its members above the interests of other members.

Finally, the Commission does not need to apply an ECO-Sat test to IGOs to prevent anti-competitive conduct among satellite operators providing services within the United States. The Commission can accomplish this purpose by adopting the test supported above in Section III.A.

IV. CONCLUSION

The Notice proposes a new regulatory framework for permitting foreign satellite systems to provide service within the United States and seeks comment on the appropriate test for determining whether an IGO should be allowed to use its space segment for this purpose. INTELSAT applauds the Commission's efforts in this proceeding and believes that consumers of satellite services will be the greatest benefactors if the proposals supported herein ultimately become FCC policy. INTELSAT urges the Commission to adopt a test that focuses broadly on the competitive consequences of an IGO providing service within the United States, and recommends that the Commission reject any test that would prohibit an IGO from providing service within the United States because some

of the IGO's members do not permit FCC-licensed satellites to provide services within their markets.

Respectfully submitted,

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